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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1942.

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No. 412  
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ERVIN HOWELL and RAYMOND EARL GUTERMUTH, *Petitioners*  
*and Appellants below,*

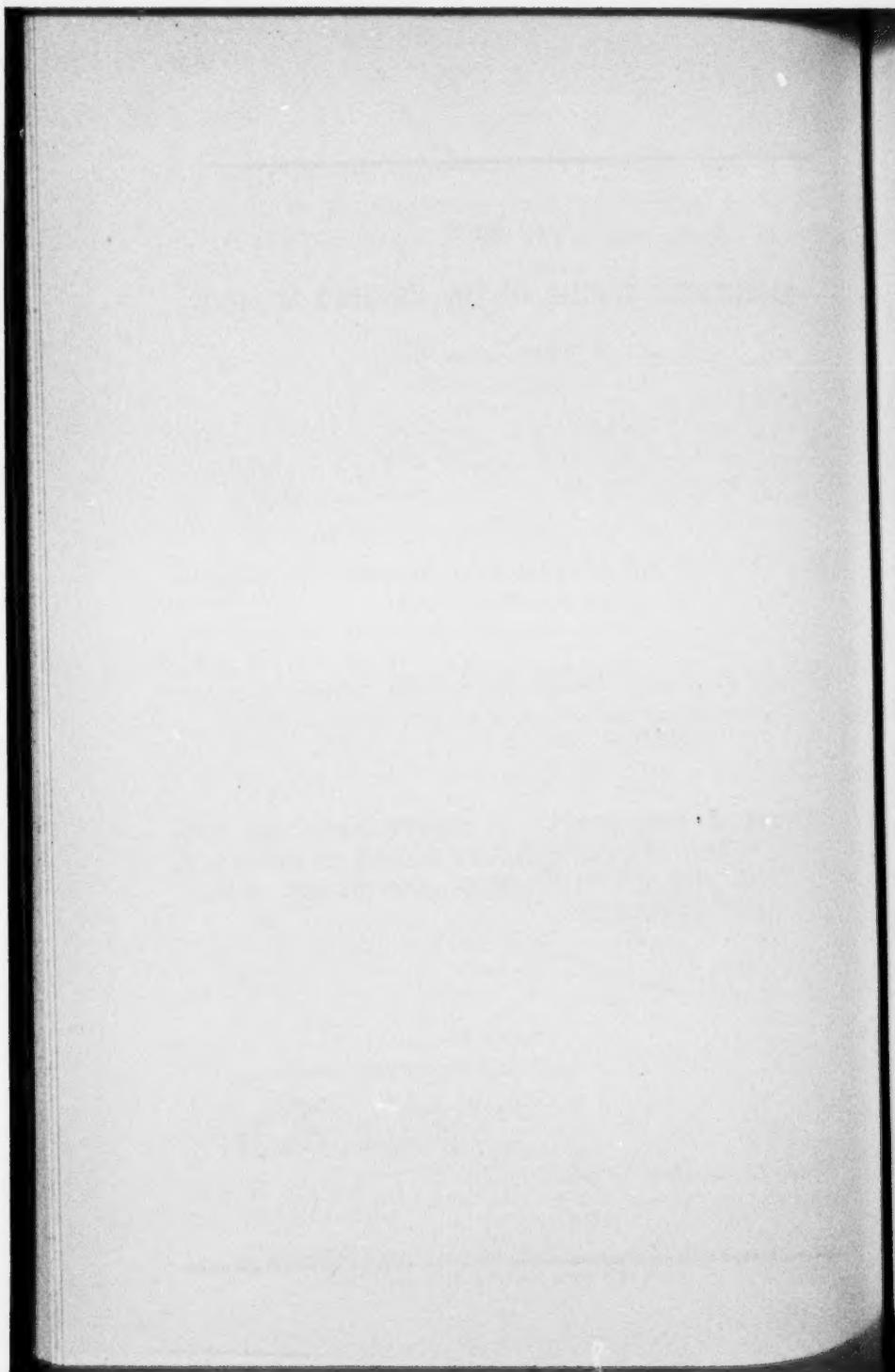
v.

ROYDEN O. COUCH, Doing Business as COUCH MANUFACTURING COMPANY, *Respondent and Appellee below.*

—  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

—  
ERVIN HOWELL,  
RAYMOND EARL GUTERMUTH,  
By FRANCIS G. BOSWELL,  
*Counsel for Petitioners.*

Dated September , 1942,  
Washington, D. C.



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FOR THE FIFTH CIRCUIT.**  
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*To the Honorable Harlan Fiske Stone, Chief Justice of the  
United States, and the Associate Justices of the  
Supreme Court of the United States:*

Your Petitioners present herewith a certified transcript from the United States Circuit Court of Appeals for the Fifth Circuit of Case No. 10150 appearing on their docket as Ervin Howell et al., Appellants, versus Royden O. Couch, doing business as Couch Manufacturing Company, Appellee; and in support of this petition respectfully show as follows:

## L

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

This is a civil action filed in the District Court for the Southern District of Florida, Miami Division, by the Respondent herein on July 24, 1940, in which the complaint charged your Petitioners and others with infringement of United States Letters Patent No. 1,893,614, granted to the Respondent on January 10, 1933. The complaint alleged both constructive and actual notice of infringement, and demanded a perpetual injunction restraining your Petitioners and a reference to a master to report an account of damages and profits. (R. 7 to 10)

Your Petitioners answered, admitting both forms of notice, but denied the main allegations of the complaint and set up the defenses of invalidity and non-infringement. (R. 11 to 14)

Prior to the trial your Petitioners propounded interrogatories to the Respondent in the answers to which the Respondent put in issue claims 1, 2 and 4 of his patent. (R. 149, No. 4)

Also prior to trial, the Respondent took depositions under Federal Rule 26, calling your Petitioners whose examinations are a part of the evidence submitted by the Respondent. (R. 95 to 132)

The trial was by the court without a jury and the Respondent's evidence comprised the testimony of two witnesses as to the practical value of the invention, (R. 16 to 30) the testimony of the Respondent, himself, (R. 32 to 64) and the testimony of an expert, Morton. (R. 64 to 94) The Petitioners' evidence included a certified copy of the file contents of the patent in suit, (R. 158 & 248) copies of prior patents which it is contended show lack of patentable invention in the patented device, (R. 158 & 301 to 333) and the testimony (R. 134 to 137) and exhibits (R. 139 & 141 & 291 to 294) of a sole witness, Anderson, as to the prior

state of the art, Anderson's testimony having been introduced to show also that the combination installed by your Petitioners was old before the Respondent's date of invention. (The Anderson model, Def. Ex. No. 5, is a large physical exhibit and a drawing disclosing it appears opposite page 10.)

Judgment was rendered for the Respondent on findings of fact and conclusions of law (R. 178 to 190) which were not based on any independently expressed opinion of the trial judge but were merely his endorsement of those prepared and submitted by Respondent's counsel. The decree (R. 190) held all of the claims in issue valid and infringed and granted the demands of the Respondent.

Notice of appeal (R. 192) was duly filed and the case, in due course, came on for hearing before the Circuit Court of Appeals for the Fifth Circuit before whom it was argued, as in the trial court, that the patent is invalid, that your Petitioners have not infringed it, and that the testimony of Anderson has the necessary probative force to show non-infringement regardless of any other considerations in the case.

The Fifth Circuit Court of Appeals handed down an opinion (R. 336) in which they held claims 1 and 4 not to be infringed, (R. 338) thus reversing the trial court with respect to these claims, and in which they expressed doubt on the validity of claim 2 but, on the conclusion that the Respondent had made a practical advance, resolved the doubt in his favor and held that claim valid and infringed. (R. 338)

A duly filed petition for rehearing was denied without opinion. (R. 339)

The construction charged to be an infringement of the patent consists of a pump unit and a so-called foundation therefor, the latter being made up of two spaced parallel concrete walls disposed in the center of a canal in the direction of the length thereof and connected by a concrete platform or deck elevated from the bottom of the canal. Di-

vergent wing walls extend from the ends of the parallel walls to the canal banks, so that the canal is constricted at the point of installation.

The pump unit is mounted on the platform or deck and extends through an opening in the same, thus disposing its intake below and its discharge above the deck.

Flashboards slideable in guide grooves in the parallel walls constitute the means by which, by proper adjustment, water is admitted selectively from either side of the foundation below the deck and transferred through the pump to the opposite side of the foundation from that at which it is admitted. While water always passes through the pump in the same direction, such flashboard adjustment can be made as will permit the water level on either side of the foundation to be raised or lowered. (R. 297, 298, 299) It is because of this that the term, "Reverse Flow Pump," has come into use.

In the construction shown in the Respondent's patent (R. 216) the pump unit is within a metal cylinder and, according to the specification, (R. 220, line 10 et seq.) has its conduit 26, at the upper margin, "extended horizontally to provide a partition or diaphragm 27" which divides the cylinder into upper and lower chambers, admission into and discharge from which is made possible by gate controlled openings in the cylinder arranged a plurality above and a plurality below the diaphragm, the openings in each plurality being angularly related. The so-called reverse flow thus is made possible when the pump is installed as a dam in an irrigation and drainage canal.

The record does not indicate that the Respondent installed more than one pump like that shown in his patent and that was at the State Experimental Station, Belle Glade, Florida. His commercial product is like that of your Petitioners when installed; and, as a manufacturer, he makes only the unpatented pump unit (R. 337, lines 12 & 13) to which he applies the patent notice. (R. 40 & 41). The foundation, except by special arrangement, the pur-

chaser must, himself, have installed which he may do with the aid of plans furnished by the Respondent as part of the latter's service. (R. 36 & 37)

Your Petitioners operate in the same manner (R. 106) and the pump which they manufacture for the so-called reverse flow use they employ in their culvert type of pump. (R. 133) And the culvert type of pump and reverse flow pump unit alone are admitted by the Respondent not to be infringements. (R. 152 & 153)

## II.

### JURISDICTION.

1. The jurisdiction of this Court arises by reason of the provisions of paragraphs (a) and (e) of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, sec. 347); and also by reason of paragraph (a) of Section 8 of the Act of February 13, 1925, (U. S. C., Title 28, sec. 350)

2. The judgment to be reviewed was given in an opinion of the Fifth Circuit Court of Appeals under date of May 22, 1942 (R. 336); and a timely filed petition for rehearing was denied in an order dated July 2, 1942. (R. 339)

3. The judgment of the Circuit Court of Appeals was rendered in a civil action under the patent laws of the United States on the issues of validity and infringement of letters patent of invention. That judgment so far rejected the Appellate Court's own criterion of patentable invention as well as the criterion of this Court, so applied the doctrine of equivalents and the rule of disclaimer by amendment, and so treated your Petitioner's evidence as to give validity and breadth to an obviously invalid patent and thus to impose upon the public in the State of Florida, the only place where the alleged invention is used, the payment of a tribute to the Respondent for something which for years they have had the right to use unrestrictedly.

4. The cases, among others, believed to sustain jurisdiction are as follows:

*Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47.

*Chicago Coin Machine Co. v. Ace Patents Corporation*, 315 U. S. —; 62 Sup. Ct. Rep. 513.

*Muncie Gear Works v. Outboard Marine and Manufacturing Co.*, — U. S. —; 62 Sup. Ct. Rep. 865.

### III.

#### THE QUESTIONS PRESENTED.

The decision of the Circuit Court of Appeals raised the following questions:

1. Does it constitute patentable invention to apply to an irrigation and drainage pump the old expedient that will permit pumping selectively from anyone of a plurality of sources and discharging selectively into any one of several reservoirs where the only necessary modification of an old device is the duplication of the admission means of the latter?

2. Is the maker or user of the accused apparatus an infringer of the patent

(a) Where the claims in suit describe the division wall as a "transverse diaphragm, the opening in which communicates with said conduit", or in variations of that expression, when the diaphragm has no defined opening but is an integral part of the conduit formed as a horizontal flanged extension of the upper end thereof; and where, in the alleged infringement, the division wall is a concrete deck actually formed with an opening in which the conduit is disposed to extend partly below and partly above the same? or

(b) Where the claims in suit prescribe a plurality of "angularly related" or "angularly disposed" inlet and outlet openings in the external housing above and be-

low the diaphragm; and where, in the construction charged to infringe, the supposed external housing is merely two parallel walls and the openings are the space between them at their opposite ends? or

(c) Where the patent is held to be of narrow scope and the alleged infringers use flashboards spanning the parallel walls instead of the gates prescribed by the patent when the single common function of the two is that of independent adjustability and when the former admittedly have certain functions and advantages not possible in the latter?

3. Is the testimony of Anderson to be rejected as failing to establish what he did and the date of his doing it

(a) Where he had an actual working model which demonstrated his construction in every detail; and

(b) Where he produced from his records the ledger sheet of the transaction with Primola Farms which refreshed his memory as to the date; and

(c) Where the Respondent's counsel sought, without objection on Petitioner's part, and secured the right to offer testimony in rebuttal to Anderson's and failed to do so; and

(d) Where the findings of fact, in the face of this omission on the part of the Respondent, speculated on the truthfulness of Anderson's testimony as to what he did; and

(e) Where the trial court made a finding of fact giving the Respondent a date of disclosure prior to Anderson's stated date of the Primola Farms installation, basing that finding on the Respondent's own statement alone, given in rebuttal and unsupported with any documentary or other evidence and at variance with the date testified to in his testimony-in-chief?

## IV.

**REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

1. The decision of the Fifth Circuit Court of Appeals has sustained as valid and infringed a patent which has not heretofore been litigated but which, by reason of the decision, will now dominate an entire industry confined wholly within the State of Florida, thus making improbable any future litigation involving the patent before any other federal court of equal dignity.

2. The decision of the Fifth Circuit Court of Appeals, sustaining the validity of the claims in suit on the presumption of validity attaching to the patent grant and on doubtful proof of commercial success of the patented invention when the only difference over an old device is the provision of a plurality of selectively controlled inlets in place of one, is a rejection of this Court's criterion of patentable invention and is, therefore, a decision in conflict with applicable decisions of this Court.

3. The decision of the Fifth Circuit Court of Appeals, sustaining infringement of claim 2 and regarding it as having breadth, is a decision so applying the doctrine of equivalents and the rule of disclaimer by amendment and originally incorporated limitations as to be in conflict with applicable decisions of this Court.

4. The decision of the Fifth Circuit Court of Appeals, refusing to give weight to the public use testified to by Anderson because it rests on his sole testimony as to time when he had tangible evidence to support his date, as well as what he had at that date and when the trial court found it necessary to make a finding of fact giving the Respondent an earlier date, is a decision in direct conflict with applicable decisions of this Court.

## V.

**PRAYER.**

Wherefore your Petitioners pray that this application for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the cause entitled on their docket, No. 10150, Ervin Howell et al, Appellants versus Royden O. Couch, doing business as Couch Manufacturing Company, Appellee, be granted; that the clerk be directed to enter an order to that effect and forthwith notify the Fifth Circuit Court of Appeals and counsel of record of the granting of the application; that the order direct that the certified transcript filed herewith be treated as though sent up in response to a formal writ to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States; that the judgment herein of the Fifth Circuit Court of Appeals be reversed by this Court; and that your Petitioners be given such further relief as to this Court may seem proper.

ERVIN HOWELL,  
RAYMOND EARL GUTERMUTH,

By FRANCIS G. BOSWELL,  
*Counsel for Petitioners.*

Dated September 22, 1942,  
Washington, D. C.

**AFFIDAVIT IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

State of Florida, County of . . . . . , ss:

Ervin Howell, being duly sworn, deposes and says that he is of legal age and is one of the Petitioners herein; that he knows either personally or by reputation the various manufacturers of drainage and irrigation pumps sold in competition with those which he and the other Petitioner herein, Raymond Earl Gutermuth, manufacture and sell; and that the entire industry in such pumps is concentrated within the State of Florida within the Fifth Judicial Circuit of the United States.

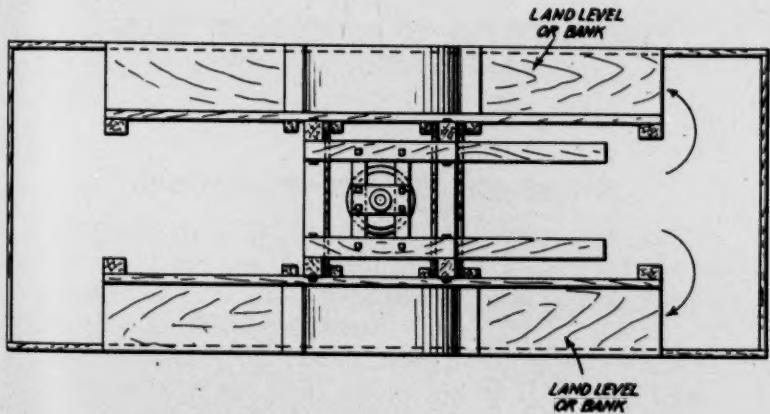
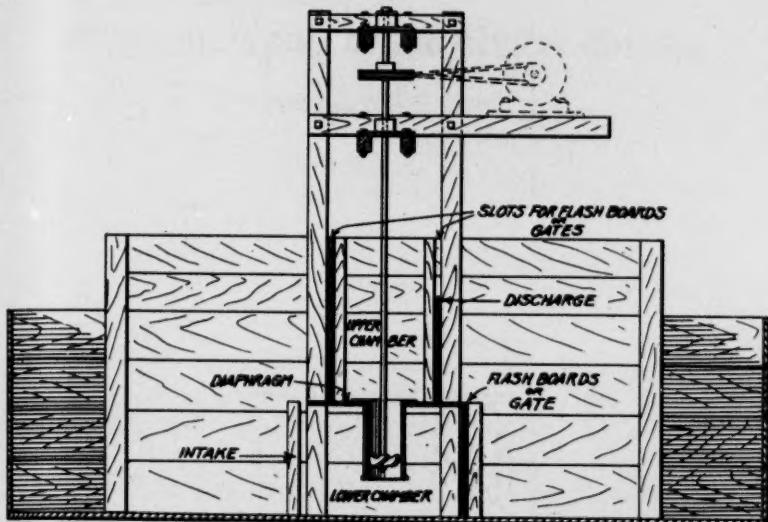
Signed ERVIN HOWELL.

Sworn to and subscribed before me this 9th day of September, 1942.

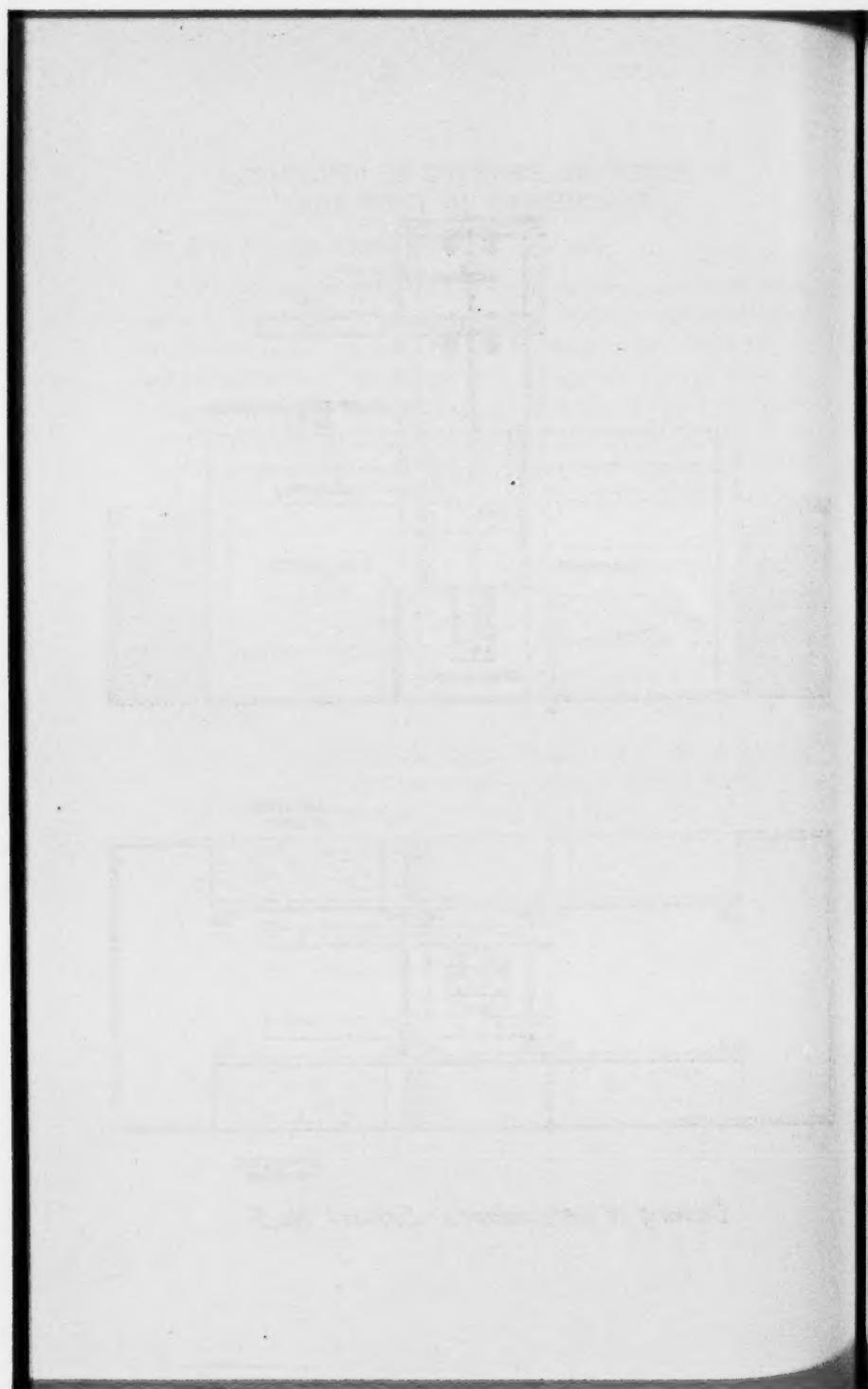
(SEAL)

MARIE COURSON,  
*Notary Public.*

Notary Public, State of Florida at Large.  
My Commission Expires Feb. 9, 1945.  
Bonded by American Surety Co. of N. Y.



*Drawing of Defendants' Exhibit No. 5*



IN THE

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OCTOBER TERM, 1942.

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v.

ROYDEN O. COUCH, Doing Business as COUCH MANUFACTURING COMPANY, *Respondent and Appellee below.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### OPINIONS OF THE COURTS BELOW.

The findings of fact and conclusions of law of the District Court for the Southern District of Florida are reported in 49 U. S. Pat. Quart. 595 and will be found beginning at page 178 of the record.

The opinion of the Fifth Circuit Court of Appeals is reported in 127 Fed. (2nd) 975 and in 53 U. S. Pat. Quart. 531, and will also be found beginning at page 336 of the record.

**JURISDICTION.**

The grounds on which jurisdiction vests are set out in the petition at pages 5 & 6, and to avoid duplication are not repeated in this brief.

**STATEMENT OF THE CASE.**

The facts have been sufficiently stated in the preceding petition (pp. 2 to 5) and that statement is hereby adopted and made a part of this brief by reference.

**SPECIFICATION OF ERRORS.**

In the event of granting this application for a writ of certiorari, your Petitioners will urge that the Fifth Circuit Court of Appeals erred:

1. In holding the claims in suit as defining patentable invention over the public use testified to by Anderson.
2. In holding the claims in suit valid as representing patentable invention over the patents to Gill (R. 310, Figs. 24 or 33) and Grunow (R. 326, Figs. 7 & 9) either singly, or the one as modified by the other.
3. In so applying the doctrine of equivalents as to make the flashboards used by your Petitioners the mechanical equivalents of the gates prescribed by Respondent's patent claims.
4. In holding claim 2 infringed by so far disregarding the expression, "a transverse diaphragm substantially the intermediate ends thereof, the opening in which communicates with the walls of said conduit" as to have it comprehend the deck or supporting shelf on which your Petitioners mount their pump unit, thereby ignoring the rule that an originally incorporated limitation in a claim must be construed against the patentee and in favor of the public and treated in the nature of a disclaimer.

5. In holding claim 2 infringed by ignoring the limitation, "said housing having a plurality of angularly disposed inlet and discharge openings below and above said diaphragm," thus ruling that the space between the parallel walls at the opposite ends thereof falls within the compass of such description and thereby failing to apply the rule of disclaimer by amendment.

6. In treating the Anderson testimony as insufficient to show that the construction made and used by your Petitioners was old, prior to the Respondent's date of invention.

7. In finding that the Respondent had made a practical advance and resolving their expressed doubt on the validity of the claim in his favor when that practical advance had to be determined from the testimony of two witnesses who gave only opinion evidence which is not clear as to whether the so-called practical advance was due to the combination of elements or to the efficiency of the admittedly unpatented pump unit.

## **ARGUMENT**

### **Summary of Argument.**

The points of argument follow the reasons relied upon for the grant of a writ of certiorari and, being stated in the index and on page 8 of the petition, are omitted at this point in the interest of brevity and to avoid duplication.

### **POINT A.**

The Court of Appeals for the Fifth Circuit has sustained as valid and infringed a patent which has not heretofore been litigated but which, by reason of the decision, will now dominate an entire industry confined wholly within the State of Florida, thus making improbable any future litigation involving the patent before any other federal court of equal dignity.

The entire industry in pumps employed for use in irrigation and drainage canals such as are used for farming

purposes in the Southern portion of the State of Florida is concentrated within said State. (R. 33, 34, 42 & 45 and the affidavit of your Petitioner, Howell, p. 10 hereof)

Respondent, while having a patent which does not purport to comprehend more than a specific form of pump apparatus having a plurality of independently controlled inlets and outlets, has urged it successfully in the trial court and apparently in the appellate court as a patent covering the so-called reverse flow whereby the device may be installed in a drainage canal and employed to raise and lower the water level at either side of the installation. While the trial court found all of the claims in issue to be valid and infringed, the decision of that court was reversed with respect to claims 1 and 4 but affirmed as to claim 2 because the appellate court saw breadth in that claim while expressing difficulty in sustaining it in view of the prior art. The decision of the appellate court will give the Respondent practical control of the irrigating pump industry which is confined to the State of Florida and will enable him to extract tribute from users on any basis which he sees fit. Your Petitioners built and sold the so-called two-way pump for prices that would yield them a reasonable profit, but such prices, according to the Respondent, were considerably below his standard prices and had a tendency to "cause an unnecessary sales resistance". (R. 295 & 296)

Since the use of the invention is confined wholly within the State of Florida and since the so-called reverse flow is a general plan for drainage and irrigation, the effect of the decision of the Court of Appeals is to give the Respondent domination of an entire industry. In *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, this Court held that notwithstanding the doubtful validity of the patent, litigation elsewhere with resulting conflict of decision was improbable because of the concentration (in that particular case) of the (automobile) industry in the Sixth Circuit, citing *Paramount Publix Corp v. American Tri-Ergon Corp.*,

294 U. S. 464, and *Altoona Publix Theatres, Inc., v. American Tri-Ergon Corp.*, 294 U. S. 477, and granted the writ.

The same reason influenced the granting of writs of certiorari, in the 1941 term, in *Chicago Coin Machine Co. v. Ace Patents Corp.*, 315 U. S. ; 62 Sup. Ct. Rep. 513; and *Muncie Gear Works v. Outboard Marine and Manufacturing Co.*, U. S. ; 62 Sup. Ct. Rep. 865.

#### POINT B.

The Court of Appeals for the Fifth Circuit has sustained the validity of the claims in suit on the presumption of the validity attaching to the patent grant and on doubtful proof of the commercial success of the patented invention when the only difference over an old device is the provision of a plurality of selectively controlled inlets in place of one and in so doing has rejected this Court's criterion of patentable invention and has, therefore, rendered a decision in conflict with applicable decisions of this Court.

The sole differentiating features in Respondent's patent over the prior art devices, as exemplified by the patents to Gill (R. 310, Figs. 24 & 33) and Grunow, (R. 326, Figs. 7 & 9) are the diaphragm which communicates with the draft and discharge conduit, the cylindrical outer casing with which the diaphragm connects, the plurality of angularly related orifices in the outer casing and the vertically adjustable gates for each slideable in guide grooves above and below the diaphragm.

The diaphragm construction differs from the construction shown in the patent to Grunow only in being an expanded portion of the upper end of the intake and discharge conduit rather than a shelf or platform supporting the pump unit. The outer casing differs from the penstock of Grunow only in being a cylindrical steel shell rather than a square or rectangular wood structure. The orifice arrangement differs from Figure 7 of Grunow only in having a plurality of openings below the platform but does not differ from Gill in this respect. And the gate construction differs

from Grunow only in having the gates mounted in guide grooves which extend above and below the diaphragm.

These differentiating features are of so inconsequential a nature that they are well within the province of the average mechanic. And on this basis they do not rise to the dignity of patentable novelty and, if not, the patent is void.

As was said by this Court in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. ; 62 Sup. Ct. Rep. 40, "We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute, the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'. Since *Hotchkiss v. Greenwood*, 11 How. 248, it has been recognized that if an improvement is to obtain the privileged position of a patent, more ingenuity must be involved than the work of a mechanic skilled in the art". (Citing authorities)

Inventive genius is not required to apply a plurality of gate controlled inlets below the pump platform of Figure 7 of the patent to Grunow, or to duplicate the inlet and outlet of the structure of Figure 9 thereof, and doing this, every material and substantial part of the patented invention will be present.

Alleged commercial success apparently influenced the Court of Appeals to sustain the validity of the claims but, as shown in the argument under Point C, what commercial success was attained was not due to the construction which the patent purportedly covers. (Specially concurring opinion of Chief Justice Stone in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. ; 62 Sup. Ct. Rep. 41.)

## POINT C.

The Court of Appeals for the Fifth Circuit, in sustaining infringement of claim 2 and in regarding it as having breadth, has rendered a decision so applying the doctrine of equivalents and the rule of disclaimer by amendment and originally incorporated limitations that such decision is in conflict with applicable decisions of this Court.

In finding claim 2 infringed the Court of Appeals must necessarily have concluded that the diaphragm prescribed by the claim is like or equivalent to the pump supporting shelf of your Petitioners. The expression "a transvers diaphragm substantially intermediate the ends thereof, the opening in which communicates with the walls of said conduit" definitely positions the diaphragm at the upper end of the draft and discharge conduit. This awkward and cryptic expression has been in the claims since the inception of the application on which the patent was granted. The diaphragm (R. 216) is an integral part of the draft and discharge conduit and has no defined opening. The term "opening" as used in the claim certainly can not mean such an opening as that in the deck on which your Petitioner's pump is disposed (R. 298) because it would then be specific to your Petitioner's construction, whereas it was drawn with a specifically different construction as a basis. It could only comprehend the construction shown in the patent and your Petitioners' construction by being generic to the two. Something which is intangible, as an opening, can not communicate with something which is tangible, as a wall, no matter how loose a meaning be given to the word "communicating".

The only logical interpretation of the expression is that the bore of the conduit opens through the diaphragm which means that the diaphragm is at the upper end of the conduit.

After persistent rejection by the Examiner, it was argued on behalf of the Respondent (R. 275, 2nd par.): "It appears that none of the references include the diaphragm

forming an expanded portion of the inlet and outlet conduit as illustrated, described and claimed by this applicant". But before the Respondent's attorneys undertook a translation of this expression and before this differentiating feature was urged, the Examiner indicated his understanding of the expression (R. 269, last 2 sentences) as meaning that the diaphragm is at the upper end of the conduit.

Claim 2 also prescribes a "plurality of angularly disposed" openings below and above the diaphragm and it is evident from the prosecution of the application that the Respondent laid great stress on the angularly related orifices and the gate for each, for in the remarks of Amendment C, (R. 279, last par.) he says:

"As now stated in the claim, the present applicant has provided a long housing which has a diaphragm across the interior thereof intermediate its ends, the housing being provided with openings above and below the diaphragm so that water may pass through the inner conduit. These openings are each closed or opened independently by means of slidable gates which are carried partly on the lower part of the housing and partly on the extension above the diaphragm, the extension above the diaphragm forming guides whereby the vertically slidable gates are held in position."

And in Amendment B, (R. 274, last par.) the Respondent says:

"Furthermore, applicant's arrangement allows the water to be drawn in around any portion of the entire circumference of the outer casing, and allows it to be discharged at any portion of the entire circumference of the outlet portion of the casing, by simply manipulating the necessary vertically adjustable gates".

Because, in your Petitioners' construction when installed, the water passes between the two masonry walls at one side, up through the pump and out between the walls at the other side, the Respondent has successfully contended below that there is present a casing with a plurality of angularly re-

lated orifices since there is more than one point of entrance for the water and these points are disposed 180° apart. (R. 89) If the term "angularly related" as used in the claims of the patent means anything, it means an angular relation less than 180° for in the patented construction the angularly related orifices are provided for changing the water level on either side of the pump in either or both of two intersecting canals. The description of the relative positions of the openings in terms of angular measurement may be proper in the patent because of the structure illustrated but there is no warrant for applying that system to indicate the relative positions of the ends of the walls of your Petitioner's foundation.

There are copious decisions of this Court which have applied the rule that limitations and provisos, imposed by the inventor, especially such as were introduced into the application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public and looked upon in the nature of disclaimers. *Leggett v. Avery*, 101 U. S. 256; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222; *Fay v. Cordesman*, 109 U. S. 408; *Mahn v. Harwood*, 112 U. S. 354; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624; *Sargent v. Hall Safe Etc. Co.*, 114 U. S. 63; *Shepard v. Carrigan*, 116 U. S. 593; *White v. Dunbar*, 119 U. S. 47; *Sutter v. Robinson*, 119 U. S. 530; *Bragg v. Fitch*, 121 U. S. 478; *Snow v. Lake Shore, Etc. R. Co.*, 121 U. S. 617; *Hubbell v. United States*, 179 U. S. 77; *Coupe v. Royer*, 155 U. S. 565; *Crawford v. Heysinger*, 123 U. S. 589; *Thompson v. Boisselier*, 114 U. S. 1; *I. T. S. Rubber Co. v. Essex Rubber Co.*, 272 U. S. 429.

Also this Court has reiterated the rule that where a patentee has narrowed his claim to obtain the patent, he may not thereafter, by construction or by resort to the doctrine of equivalents, give the claim the larger scope which it might have had without the amendments amounting to a disclaimer. *I. T. S. Rubber Co. v. Essex Rubber Co.*, 272 U. S.

429; *Weber Elec. Co. v. Freeman Elec. Co.*, 256 U. S. 668; *Smith v. Magic City Kennel Club*, 282 U. S. 784.

Again this Court has said that claims can not be construed to include more than their language fairly imports, even though the patentee may have been unfortunate in his selection of words and have been entitled to broader claims. *McClaim v. Ortmayer*, 141 U. S. 419.

In finding the flashboards used by your Petitioners to be the mechanical equivalents of the slideable gates prescribed by the Respondent's patent, the appellate court has made a loose application of the doctrine of equivalents. In the patent the gate controlled discharge openings are fixed and the plane of their lower edges never changes. With flashboards the discharge openings, in effect, change in position with the adjustment of the flash boards, the plane of the lower edge of either discharge opening being determined by the uppermost flash board. The Respondent at pages 40 and 41 of the record testified to certain advantages flowing from the use of flashboards and these advantages are not possible of accomplishment in the patented construction.

#### POINT D.

The Court of Appeals for the Fifth Circuit, in refusing to give weight to the public use testified to by Anderson because it rests on his sole testimony as to the time when he had tangible evidence to support his date, as well as what he had at that date and when the trial court found it necessary to make a finding of fact giving the Respondent an earlier date, has rendered a decision in direct conflict with applicable decisions of this Court.

Prior knowledge and use by a single person will suffice to void a patent, the number is immaterial. *Egbert v. Lippman*, 104 U. S. 333; *Hall v. Macneale*, 107 U. S. 90; *Alexander Millburn Co. v. Davis-Bournonville Company*, 270 U. S. 390.

If the patentee is not the first inventor his patent is void. This Court has reiterated that proposition at brief inter-

vals for over a hundred years. Your Petitioner's construction is identical with that used by Anderson and if the former is comprehended by the Respondent's patent, the patent is invalid by reason of Anderson's prior use.

While Anderson is the only witness as to what was done in 1929, that fact is not fatal if Anderson can definitely establish the date and what he had on that date. There is no rule or law requiring the rejection of the testimony of a lone witness and it is sufficient, on definitely establishing facts to prove anticipation. *Corona Cord Tire Co. v. Dovan Chemical Corp.*, 276 U. S. 358.

In the reported case, proof of prior reduction to practice, both as to time and form, lay in the testimony of the lone witness, Kratz, who said that he had told no one of the fact but that he had vulcanized three hundred tubes of a thousand tube order, using the patented process for the purpose.

The finding of fact in the trial court with respect to Anderson seeks to make it appear that it was uncertain what he had despite the fact that he produced a large working model to illustrate the form and a ledger sheet of the transaction with the Primola Farms to determine the date. (R. 141 and 293 and illustration opposite page 10.) And despite the fact that Respondent was given the opportunity, without objection, of rebutting the Anderson testimony, the finding concludes with the statement that the Primola installation constituted "nothing more than an abandoned experiment", when Anderson had nothing to abandon since it was not his invention. (R. 186, 136, 139, and 292) There is no reason behind the conclusion that the Primola Farms installation was an "abandoned experiment" unless the date be admitted as established.

The finding of fact (R. 183, No. 5) which gives the Respondent a disclosure date in the early summer of 1929 is a tacit admission that the date Anderson testified to is established. Otherwise there is no occasion for establishing any dates for the Respondent prior to the date of his application for patent. Yet the 1929 disclosure date is accorded him

on his own testimony alone, unsupported by documentary or other evidence and when it was given in rebuttal and is prior to the date testified to in his testimony-in-chief. (R. 34, line 21)

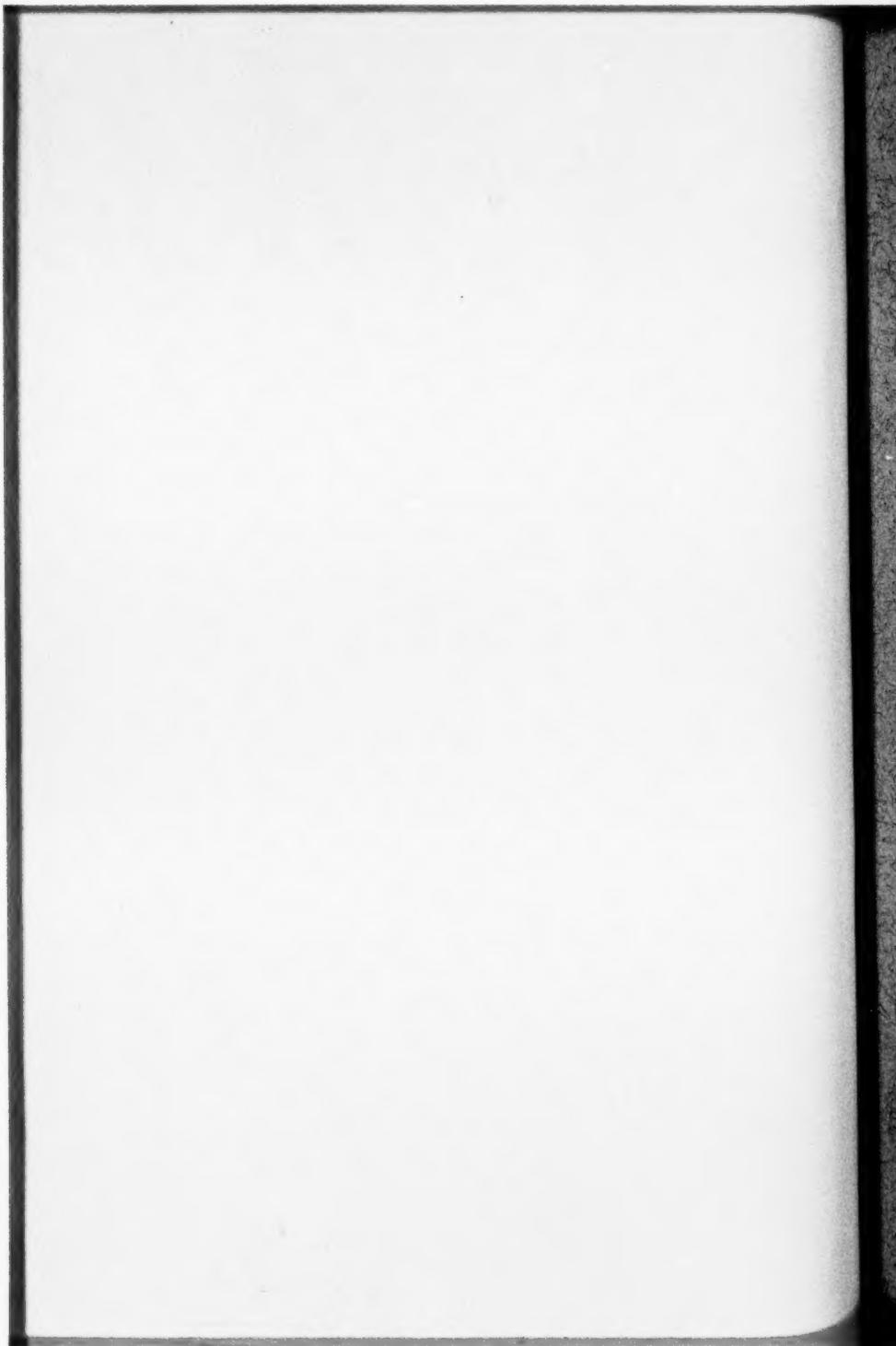
The construction installed by your Petitioners is a "chinese copy" of the Anderson model and if that and the ledger sheet be proof of the form and date of the Primola Farms installation, as they certainly are, your Petitioners are shown to be non-infringers regardless of any other considerations.

#### **CONCLUSION.**

Wherefore, your Petitioners respectfully submit that this application for a writ of certiorari should be granted and that the decision of the United States Circuit Court of Appeals for the Fifth Circuit, should upon review, be reversed.

**FRANCIS G. BOSWELL,**  
*Counsel for Petitioners.*





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U.S. Supreme Court, D.C.  
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# Supreme Court of the United States

October Term 1942.

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No. 412  
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EVAN HOWELL AND RAYMOND EARL GUTERMUTH,  
*Petitioners and Appellants below,*

v.

ROYDEN O. COUCH, doing business as Couch Manufacturing  
*Company, Respondent and Appellee below.*

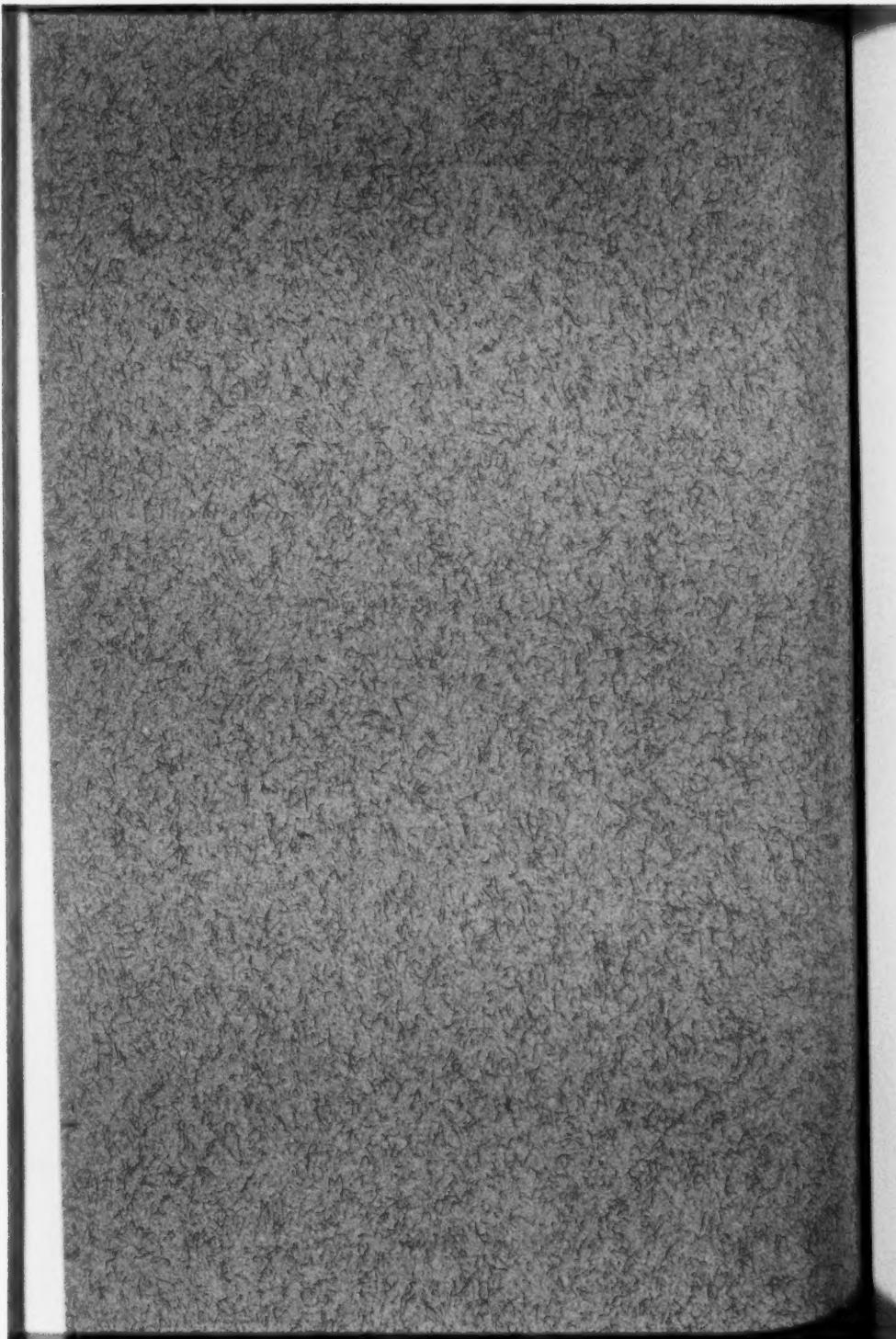
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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CHARLES R. FENWICK,  
*Counsel for Respondent.*

HOLLIS BIRNHAM, JR.,  
*Of Counsel.*

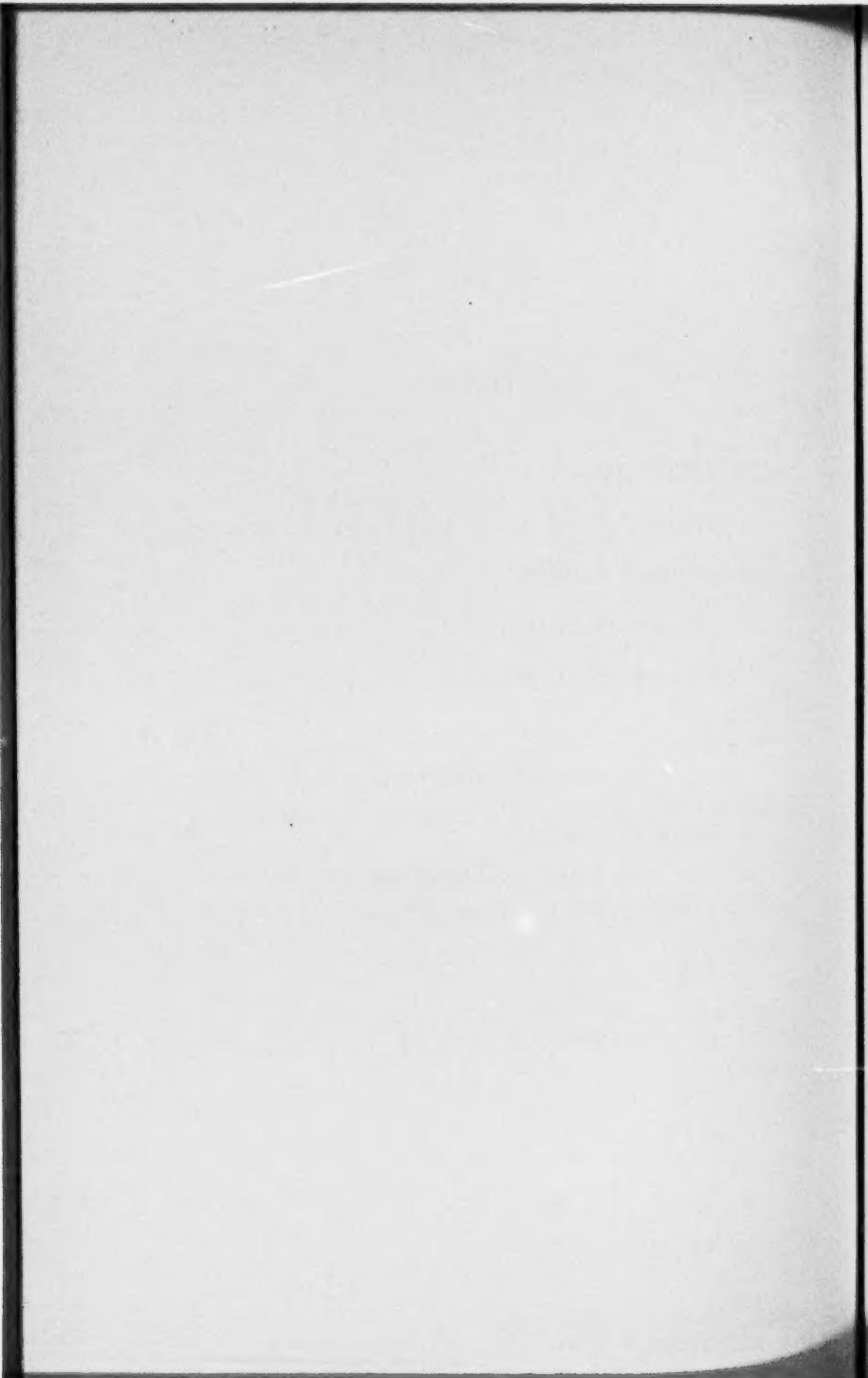


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# Supreme Court of the United States

October Term 1942.

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No. 412.

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ERVIN HOWELL AND RAYMOND EARL GUTERMUTH,  
*Petitioners and Appellants below,*

v.

ROYDEN O. COUCH, doing business as Couch Manufacturing  
Company, *Respondent and Appellee below.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### PETITIONERS' POINT A.

The Court of Appeals for the Fifth Circuit has sustained as valid and infringed a patent which will now dominate the entire industry, confined wholly within the State of Florida, thus making improbable any future litigation involving the patent before any other Federal Court of equal dignity—

Petitioners, without any support from the record, give the impression the only manufacturers of pumps for drainage and irrigation reside in the State of Florida and are controlled by the decision of the Court of Appeals for the Fifth Circuit. This is wholly untrue as shown by the affidavit of Royden O. Couch, respondent in this case:—

**"AFFIDAVIT.**

City of New York, State of New York, ss

ROYDEN O. COUCH, being duly sworn, deposes and says that he is a citizen of the United States and a resident of Grant, Florida, that he is respondent in the petition of Ervin Howell and Raymond Earl Gutermuth for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, Civil Action No. 412;

That to his own knowledge the problem of low head pumping both for irrigation and drainage is not confined to the territory within the jurisdiction of the Fifth Judicial Circuit, but is widespread throughout the United States, particularly in California and those other parts of the far West where irrigation is practiced, and in connection with flood control projects which have been established on rivers in Pennsylvania, West Virginia, Ohio, Kentucky and other Eastern states;

That he knows either personally or by reputation that a large number of manufacturers in different parts of the United States outside of the Fifth Judicial Circuit are engaged in the manufacture and sale of pumps for irrigation and drainage, and that among such manufacturers are the following, all of whom are located outside of the Fifth Judicial Circuit:

Kimball-Crogle, Los Angeles, Calif., ROC.

Mills-Chalmers Co., Milwaukee, Wis., ROC.

Byron-Jackson Co., E. Slauson & Thomas Aves., Los Angeles, Calif.

Victor Equipment Co., Kimball-Krogh Pump Div., 1010 E. 62d St., Los Angeles, Calif.

Pomona Pump Co., Pomona, Calif.

Aurora Pump Co., 510 Loucks St., Aurora, Ill.

Fairbanks, Morse & Co., 606 So. Mich. Ave., Chicago,

Ill.

Frederick Iron & Steel Co., Frederick, Md.

Lawrence Pump & Engine Co., Box 70, Lawrence, Mass.

Worthington Pump & Machinery Co., 426 Worthington Ave., Harrison, N. J.

Quimby Pump Co., Inc., 344 Thomas, Newark, N. J.

Morris Machine Works, 20 E. Genesee, Baldwinsville, N. Y.

Trench & Marine Pump Co., Inc., 130 West 22d St.,  
New York, N. Y.

Goulds Pumps, Inc., 75 Falls St., Seneca Falls, N. Y.  
The F. E. Myers & Bro. Co., 80 - 4th St., Ashland,  
Ohio.

Economy Pumps, Inc., Weller & Zimmerman Aves.,  
Hamilton, Ohio.

Link-Belt Company, 2049 W. Hunting Park Ave.,  
Philadelphia, Pa.

W. F. Stuckeman & Co., 202 Lemoyne Ave., Pitts-  
burgh, Pa.

Lawrence Machine & Pump Corp., 363 Mkt. St.,  
Lawrence, Mass.

That the irrigation and drainage pumps made by  
said manufacturers are in the same competitive line  
with the pumps made by the respondent, the extent of  
whose manufacture of such pumps does not exceed 5 per  
cent of such pumps manufactured in the United States.

ROYDEN O. COUCH.

Sworn to and Subscribed before me this 6th day of  
October, 1942.

CHARLOTTE R. HAUSER,  
(Seal) Notary Public.

Notary Public, Bronx Co. No. 30, Reg. No. 88H43.  
Cert. filed in N. Y. Co. No. 491, Reg. No. 3H337.

My Commission expires March 30, 1943."

It is obvious from this that there is every opportunity for  
litigation to develop elsewhere with resulting conflict of  
decision permitting normal procedure and the application of  
the usual rules.

Petitioners attempt to bring the case within the doctrine  
of *Schriber Schroth Co. v. Cleveland Trust Company*, 305  
U. S. 47, and other cases cited; but no similar state of facts  
exists in the instant case. Petitioners are not innocent in-  
fringers but imitators, having been trusted employees (R.  
102) who deliberately entered the field, making respondent's  
exact commercial structure (R. 80).

### PETITIONERS' POINT B.

The Court of Appeals has sustained the validity on the presumption of validity attaching to the grant; doubtful proof of commercial success and differences over an old device in having a plurality of selective control inlets in place of one, and thus rejected this court's criterion of patentable invention.

The court below did not rely solely on the presumption of validity attaching to the grant but on convincing evidence.

Respondent, an engineer, became interested in the great farming loss due to lack of water control in the Everglades region of Florida. He found Lake Okeechobee, lying at the head of the Everglades, serving as a great shallow basin and a vast peat and muck blanket covering the territory known as the Everglades. Large drainage ditches extended from Lake Okeechobee through this area with connecting ditches or canals, presenting the problem of making available a supply of water for irrigation during certain periods and drainage during others, with certain fields requiring a higher water table than others. Farmers were losing hundreds of crops from either too much or too little water and they didn't average more than one out of every ten planted (R. 18).

Creech, farmer and supervisor of the shore drainage district comprising four thousand acres, testified he commenced farming in 1919 and that since 1935, when his farm became completely Couch pump controlled, he had not lost a single crop from too much or too little water and that if it were not for the Couch pump very few would be farming in the Everglades today (R. 18).

Stuckey, a farmer of twenty-five years experience in the Glades, and who farms three thousand acres of reclaimed Pelican Bay bottom lands five foot below the Lake Okeechobee water table, stated he and other farmers were at the mercy of the elements until the Couch pump was installed.

When asked what part the Couch pump played in his own experience he said:

"Well personally, I think the Couch two-way pump is an answer to a maiden's prayer. We think we can't get along without them." (R. 26)

Respondent, an individual, saw the need, solved the problem, personally financed the manufacture of the pump and made it possible for farmers in the Everglades to survive. With little or no advertising, the sale of the Couch pump has steadily increased, representing a dollar value of more than \$243,000.00 (R. 42). This is the very type of invention courts like to protect—an individual divorced from big business, seeing the need, solving it, and benefiting mankind.

The respondent was the first to pump water off or on the land by making a high and low body of water accessible to the inlet side of the pump through selectively controlled inlet gates and making the outlet of the pump accessible to the high and low bodies of water through selectively controlled outlet gates so that by adjusting the outlet gates direct unimpeded gravitational flow may be established between the high and low bodies, while at the same time, by adjusting the inlet gates and starting the pump, the gravitational flow may be supplemented by pumping. *This was a new concept and principle* from the prior art, the prior pumps being adapted to pump onto the land, relying solely upon gravity to drain the land, or in pumping off of the land by bodily transpositioning the pump from the high to the low body of water.

Petitioners are completely in error when they state that—

"The only differences over the old device is the provision of a plurality of selectively controlled inlets in place of one."

Petitioners rely on the patents to Gill and Grunow in support of this statement. These were considered by the Patent Office, the District Court and the Circuit Court of

Appeals and discarded as failing to show the same mode of operation as is present in respondent's patent.

Petitioners after making the above quoted statement point out at least four structural differences, but the important point is that the mode of operation is entirely different, Grunow relying on the water being pumped onto the land and gravitational flow back down through the pump under which arrangement the volume of water discharged can never be supplemented beyond the gravitational flow, whereas with respondent's structure the water always flows up through the pump and the gravitational flow can be supplemented by pumping, under all conditions.

The patent to Gill teaches nothing more than the designing of an efficient impeller.

"It is, of course, urged, and naturally, that no more than a mechanic's skill was needed to take the final step. But a mechanic is one who applies his trade by rule or rote, and only uses what he learned yesterday to do the work of today in the same old manner. He may do it excellently, but if he has, not only hindsight, but insight of foresight, first to comprehend the problem and use even the learning of yesterday to do the new thing in a new way, that mechanic has usually earned the inventor's title." *A. Kimball Co. v. Noestring Pin Ticket Co.*, 262 F. 148.

Mechanical skill cannot be advanced to create a different mode of operation.

#### PETITIONERS' POINT C.

**The Court of Appeals has applied the doctrine of equivalents in conflict with decisions of this court.**

It is submitted that Claim 2 which both the District and Circuit Courts found to be valid and infringed, reads squarely on petitioners' structure without applying the doctrine of equivalents. It is fundamental that a patent, like any other written instrument, is to be determined and interpreted by its own terms. *Goodyear Dental Vulcanite Company v. Davis*, 102 U. S. 220, 26 L. Ed. 149.

Claims as finally allowed speak for themselves where they are in plain language and the interpretation of this language is not in doubt. Neither the District nor Circuit Courts found it necessary to apply the doctrine of equivalents, but found the language of Claim 2 to clearly read on petitioners' structure. Petitioners create this issue out of thin air,—they set it up as a straw man in order to knock it down.

Petitioners have copied respondent's commercial structure and admit that if the claim reads on respondent's commercial structure then petitioners' structure is an infringement (R. 80). The record shows clearly without resorting to equivalents or otherwise, that the claim reads on both structures (R. 71, 75).

Since the court has not applied the doctrine of equivalents, there can be no violation of the Supreme Court rule.

Claim 12, now renumbered Claim 4 in the patent, is an original claim which has never been cancelled; and 13, 14 and 15, now numbered 1, 2, and 3, are directed to the same subject matter so that there has been no lapse of time between the cancellation and insertion of any claims which precludes any contention of dedication or abandonment of the subject matter of the claims.

#### **PETITIONERS' POINT D.**

**The Court of Appeals in refusing to give weight to public use testimony of Anderson because it rested on his sole testimony has rendered a decision in direct conflict with applicable decisions of this Court.**

Public use is a question of fact. The District Court had an opportunity to hear and see Anderson; the Circuit Court carefully examined his testimony and rejected it, not solely because it was uncorroborated, but as expressed by the court:

“We do not give weight to the model and the public practice attributed to Anderson just prior to the time Couch claims to have made his invention. It rests sub-

stantially on Anderson's sole testimony as to time, and his testimony was not by the trial judge who saw him considered convincing. To us also it seems vague and inconclusive."

Obviously the Circuit Court has not violated any rule of this Court when it rejects the testimony of Anderson as being "vague and inconclusive".

The trial court in its findings of fact (R. 186) pointed out many discrepancies in Anderson's testimony, calling it "uncorroborated, nebulous and unsatisfactory and falling far short of the degree of proof required in cases of this sort".

#### CONCLUSION.

Petitioners have presented no legal question for consideration by this Honorable Court which warrants the granting of their petition. Although they have selected certain cases in which certiorari has been granted and attempted to pitch the issue in conformity with such cases, no such grounds exist in the case at bar, and for the most part the petitioners complain of facts found by the trial and circuit courts which are usually not reviewed by this court under its rules.

Respectfully submitted,

CHARLES R. FENWICK,  
*Counsel for Respondent.*

HOLLIS RINEHART, JR.,  
*Of Counsel.*





IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1942

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No. 412

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ERVIN HOWELL AND RAYMOND EARL GUTERMUTH, *Petitioners*,  
v.

ROYDEN O. COUCH, doing business as COUCH MANUFACTURING  
COMPANY, *Respondent*.

---

**REPLY BRIEF OF PETITIONERS TO RESPONDENT'S  
BRIEF OPPOSING GRANT OF WRIT OF  
CERTIORARI.**

---

Low head pumps for drainage and irrigation, which it seems have been made the subject of the Respondent's affidavit in his opposing brief, are not the subject in this controversy. The so-called two-way or reverse-flow pump is involved herein and its use, according to the Respondent's attempted proofs, is peculiar to the farming conditions found in Florida, particularly the Everglades section. (R. particularly pp. 42 and 45)

Although the invention is entitled in the patent, "Low Head Rotary Pump," all of its advantages have been urged, in this litigation, as flowing from the combination which provides for the reverse flow and the affidavit does not allege that this expedient is used by any of the manufacturers

listed in it, or that there is any infringement of the Respondent's patent outside the State of Florida according to his conception of what it comprehends.

The patent is now nearly ten years old (R. 219) and, so says the Respondent, his invention with its alleged advantages has been known over twelve years. (R. 34) If there has been no use of it other than in Florida (and the Record does not indicate that there has) there is no likelihood of such use in the future. There is, therefore, no likelihood of future litigation outside the Fifth Judicial Circuit even if the Respondent were disposed to enforce his patent elsewhere. And it is not probable that he would seek to enforce it in the event of such infringement since, from the Record, he is apparently content with the business the State of Florida affords him.

The position of the Petitioners is that the decision of the Fifth Circuit Court of Appeals, of which they complain, is wrong for the reasons fully set out in their petition and the brief which accompanied it, and that, if this Court does not assume jurisdiction and right the matter, the farmers of Florida (and probably other members of the public) will be subject to having imposed upon them the payment of a tribute to the Respondent for the use of something which by Anderson's act, if no other, passed into the public domain before any conception by the Respondent.

Drawing on the Appellate Court's decision for expression, the Respondent in his opposing brief characterizes the Petitioners as imitators. If so, they stand with the Respondent in this respect, for both he and they make, not his patented invention, but the construction made earlier by Anderson and in all probability made earlier still by Dr. Tatom. (R. 136)

It is submitted that the writ of certiorari should be granted.

ERVIN HOWELL,  
RAYMOND EARL GUTERMUTH,  
By FRANCIS G. BOSWELL,  
*Counsel for Petitioners.*





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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

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No. 412.  
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ERVIN HOWELL AND RAYMOND EARL GUTERMUTH, *Petitioners*,

v.

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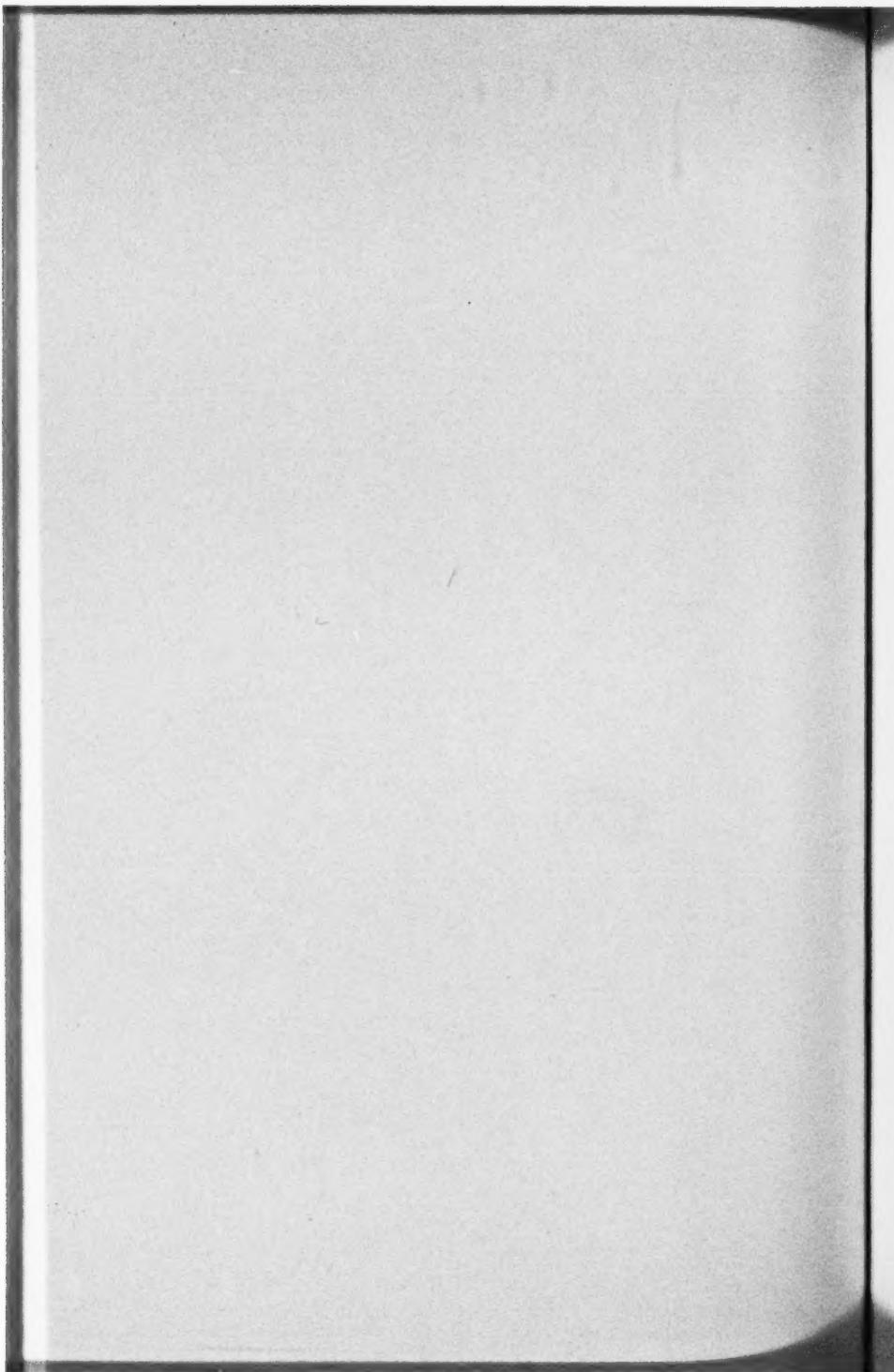
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## PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

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ERVIN HOWELL,  
RAYMOND EARL GUTERMUTH,

By FRANCIS G. BOSWELL,  
*Counsel for Petitioners.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

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No. 412.

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ERVIN HOWELL AND RAYMOND EARL GUTERMUTH, *Petitioners*,  
v.

ROYDEN O. COUCH, doing business as COUCH MANUFACTRING  
COMPANY, *Respondent*.

---

**PETITION FOR REHEARING OF APPLICATION FOR  
WRIT OF CERTIORARI.**

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*To, the Honorable Harlan Fiske Stone, Chief Justice of the  
United States and the Associate Justices of the Su-  
preme Court of the United States:*

Come now Ervin Howell and Raymond Earl Gutermuth, the petitioners in the above entitled cause, and, as provided in Rule 33, present this, their petition for a rehearing of the said cause and, in support thereof, respectfully show:

1. The affidavit filed by the Respondent and printed in his opposing brief contained information which came as a surprise to the Petitioners, because the information on which

they proceeded fully justified their allegation that the specific invention is limited in use to Florida.

After denial of the petition for a writ of certiorari, the Petitioners' counsel addressed a letter to each of the manufacturers listed in the Respondent's affidavit advising each addressee of the litigation, that it was being sought to have the Supreme Court review the case, that the reverse flow expedient was thought to be peculiar to Florida, that the Respondent had given the addressee's name in a traversing affidavit, and that a drawing illustrating the construction which is the subject of the controversy was enclosed.

A print of the drawing of the Anderson model, as in the illustration opposite, was enclosed, since that gives generally the most complete information of the construction in controversy.

On the back of the drawing appeared the following questions:

"(1) Do you install your pumps in a foundation consisting of parallel walls spanned with a shelf on which the pump is mounted and which are also spanned with adjustable flashboards so that water movement can be accomplished in either direction as in the construction shown on the obverse side hereof? A. ....

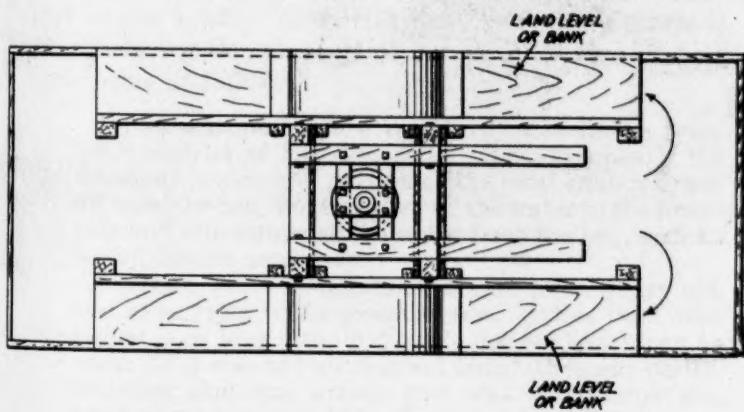
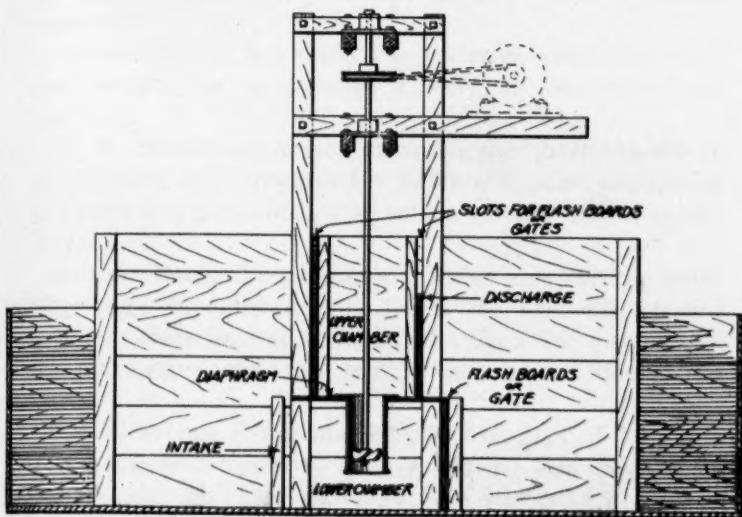
(2) Do any users of your pumps install them in such a way as to accomplish this two-way movement of the water? A. ....

(3) Is the expedient illustrated in the drawing used, to your knowledge, anywhere in the United States? A. ....

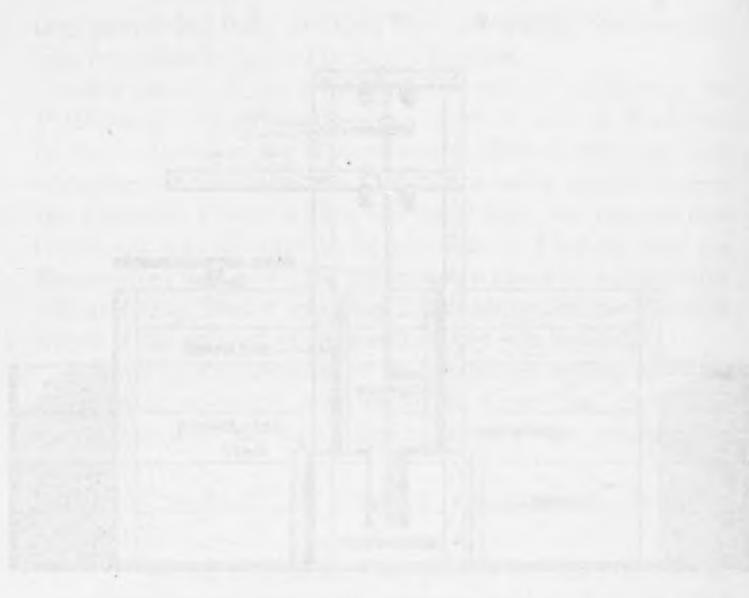
(4) If the answer to the preceding question is in the affirmative, will you please state where? A. ...."

Replies have been received from all of the addressees except Link Belt Co., Trench and Machine Pump Co., Inc., Quimby Pump Co., Inc., and Economy Pumps, Inc. The others answered as follows:

Morris Machine Works merely replied, "No comment" written on the questionnaire.



*Drawing of Defendants' Exhibit No. 5*



1800-1801  
1802-1803

1804-1805 1806-1807

Byron Jackson Co., Frederick Iron and Steel Co. and F. E. Myers & Bro. Co. answered the first three questions negatively.

Goulds Pumps, Inc. replied by letter in which the statement constitutes a negative answer to the first three questions.

W. F. Stuckeman & Co. answered the questionnaire in the negative and forwarded a letter and print explaining how their pump could be used in the manner shown on the drawing.

Pomona Pump Co. addressed a letter in which the questions were repeated and in which the first and second questions were answered negatively, the third question in the affirmative and the fourth question, "Florida by Couch".

The Lawrence Pump and Engine Co., replied by letter giving a general negative answer, stating that their name was probably given through error and suggested writing to Lawrence Machine and Pump Corporation, to whom a letter had been addressed.

The Lawrence Machine and Pump Co., referred Petitioners' counsel's letter to the Hayden Cranberry Separator Manufacturing Co., who replied, the essential part of their letter being as follows:

"Two way pumps are rather common in the cranberry district of Massachusetts. Quite frequently the reservoir is simply a portion of the total swamp dyked off from the bog, and to utilize all the water in the reservoir and also return all the water from the bog, such an installation is necessary.

Some of these installations are 12 to 15 years old, and so on right to the present year. Unless the Couch patent is of long standing, we do not see how it can be valid, as it was not an original idea. It is our understanding that any article that was in common use, (meaning an open sale to the general public) for two years or more, is not patentable. Therefore, if the Couch patent is comparatively recent, it could be con-

tested on the ground that a similar installation was already in use. We have in mind such an installation by H. R. Bailey about twelve years ago. No doubt by further inquiry, we could dig up some even older. Beaton pumps have been similarly installed, and two Lawrence pumps."

The letter addressed to the Worthington Pump and Machinery Co., was referred to Rohe Meyer, patent attorney, who in his letter in reply said that the Worthington Company had sold thousands of drainage and irrigation pumps but that, except in special instances, the manner of installation was unknown. He expressed personal recollection of a truck farm in the "Delta region" of Louisiana where the owner at different periods of the year reversed the direction of flow of the water. He suggested writing to Fairbanks Morse & Co., to whom a letter had already been written and expressed his personal opinion that the reverse flow expedient was not peculiar to Florida.

The Peerless Pump division of the Food Machinery Corp., replied for the letters addressed to Kimball-Crogel and Victor Equipment Co., their letter being a general negative answer to the several questions.

Fairbanks Morse & Co., replied with a negative photostatic print of the questionnaire with questions 1 and 3 answered affirmatively, question 2 unanswered and question 4 answered, "Florida".

The Aurora Pump Co., replied by a letter in which they gave a general negative answer to the questions asked.

Allis Chalmers Manufacturing Co. replied to the letter addressed to Mills-Chalmers Co., answering questions 1, 2 and 3 in the negative and writing a letter modifying their answer to question 2 to the effect that they had accomplished two-way pumping of water between pressure tanks by use of a propeller type pump driven by a reversible electric motor.

The Respondent does not manufacture his patented invention and neither do the Petitioners. Both make only

the pump unit and the Respondent applies the patent notice to his (R. 41) although the pump unit is unpatented (R. 337 lines 12 and 13). Only when the pump is installed in a foundation which provides for the reverse flow is the invention, as it has been adjudged to be patented, produced.

The correspondence conducted as a result of the Respondent's affidavit in his opposing brief shows the alleged invention is limited in use to the State of Florida, unless the doubtful statement of the patent attorney, Meyer, and the letter of the Hayden Cranberry Separator Machinery Co., are evidence of use elsewhere. The Hayden Company's letter is probably based on a full understanding of the supposed invention and actual knowledge of its use in the cranberry district of Massachusetts. The stated length of time of such use is probably correct and so unfavorable to the Respondent that litigation instituted by him in Massachusetts is highly improbable.

The concerns listed by the Respondent in his affidavit are doubtless competitors of his as regards the pump unit but certainly are not competitors so far as the reverse flow use is concerned.

It is submitted that the Petitioners were justified in their allegation of limitation of use of the invention to Florida and that this case presents a condition within the rule applied in *Schriber-Schroth v. Cleveland Trust*, 305 U. S. 47.

The entire correspondence with the concerns mentioned in the Respondent's affidavit has been filed with the Clerk in case the Court should desire to refer thereto.

2. The validity of claim 2 was sustained in spite of doubt because, as the Circuit Court of Appeals expressed it, they were "convinced that Couch has made a practical advance by combining the things he did in his pump" (R. 338). That conclusion must have been based on the testimony of Creech and Stuckey (R. 16 to 38) and the Respondent's own testimony as to the monetary value his sales reached (R. 42). The latter is unsupported with documentary or

other evidence and the testimony of Creech and Stuckey, objected to when given and at the close of the Respondent's (Plaintiff's) case, (R. 133) was opinion testimony, uncertain in the extreme as to whether it was based on the efficiency of the pump unit or the utility of the foundation in which the unit was mounted to produce the alleged combination invention. Apparently the efficiency of the pump unit elicited their favorable expressions.

The Respondent (Plaintiff) opened his case with the testimony of Creech and Stuckey. If that testimony had any place in the trial, it was in rebuttal to the defense of invalidity.

It is submitted that such evidence as the Respondent and his two witnesses, Creech and Stuckey offered is entirely insufficient to call for the resolution of doubt of validity in the Respondent's favor.

3. The limitation in claim 2 of the patent "*a transverse diaphragm substantially intermediate the ends thereof, the opening in which communicates with the walls of said conduit*" and which also appears in claims 1 and 4 in slight variations of the form of expression in claim 2, is not susceptible of definite translation. The terms employed are not used in the specification and, in the patent, the patentee has nowhere supplied a lexicon for them. His patent attorney did, however, in the arguments made in the prosecution of the application, particularly in the amendment of November 28, 1931 (R. 275, 2nd par.) and it is contended that he is bound by his patent attorney's translation.

The Petitioners, however, know of no decision of this Court specifically on the point of how a word or expression in a claim should be construed or interpreted where the meaning is hidden or in conflict with the commonly accepted meaning and no definition is supplied by the patentee.

While the Circuit Court of Appeals held claims 1 and 4 not to be infringed and were right in this respect, the rea-

sons given were illogical, being based on a misapplication of the doctrine of equivalents.

The Court of Appeals held that "guides extended above said diaphragm" (R. 338, 3rd par.) is a limitation to which the guide grooves in the concrete walls of the Petitioners' construction (R. 298) do not respond. Yet there is no functional difference in them and barely any structural difference. On the other hand the Appellate Court held that the flashboards of the Petitioners and the vertically adjustable gates of the patent claims are equivalents when the only thing they have in common is independent adjustability and when the flashboards have advantages not possible with the gates of the patent, as for example, the automatic return of excess water in case of light rains, predetermination of the water table etc. (R. 40, last 7 lines).

It is submitted that in this case there has been a total failure to make the proper application of the rule of equivalents which can only be rectified, under all the conditions that obtain, by this Court assuming jurisdiction.

4. With respect to the Anderson testimony, that was characterized as vague and inconclusive. A rigid rule was applied for gauging its probative force, but an exceedingly liberal one obtained in appraising the Respondent's testimony. He was given a date of disclosure in the early summer of 1929 (R. 183) on testimony given in rebuttal after he had heard Anderson (R. 177), when on direct examination he fixed the time of the drawing and design of the first pump as in the "latter part of 1929 or early 1930" (R. 34).

Cross examination of Anderson was not on the essentials of his testimony. It sought only to make something out of the fact that he could not fix the date of the making of the model which was previous to the installation at Primola Farms; and was an abortive attempt to make him admit that the model was a "one-way" pump.

It is submitted that, on the Anderson testimony alone, judgment should have been for the Petitioners.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that the writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit applied for be awarded, and that the judgment of the said Circuit Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

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*Counsel for Petitioners.*

**CERTIFICATE OF COUNSEL.**

I, Francis G. Boswell, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing in this cause is presented in good faith and not for delay.

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FRANCIS G. BOSWELL.

**ACKNOWLEDGMENT OF SERVICE.**

Service acknowledged this .... day of November, 1942.

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CHARLES R. FENWICK,  
*Counsel for Respondent.*

